UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**ELECTRONICALLY FILED**

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DANILE McGUIRE,
Plaintiff,

**08 CIV 2049 (SCR)**

-against-

VILLAGE OF TARRYTOWN; DREW FIXELL, Individually and in his capacity as Mayor of the Village Of Tarrytown; STEVE McCABE, individually and in his capacity as Village Administrator of the Village of Tarrytown; SCOTT BROWN, individually and in his capacity as Chief of Police of the Village of Tarrytown; SERGEANT FRANK J. GIAMPICCOLO, individually and in his capacity as police officer of the Village of Tarrytown; SERGEANT JOHN C. GARDNER, individually and in his capacity as police officer of the Village of Tarrytown; SERGEANT JOHN BARBALET, individually and in his capacity as police officer of the Village of Tarrytown; SERGEANT KEVIN BARBALET, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER CHRISTOPHER COLE, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER GREGORY M. BUDNAR, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER DENNIS C. SMITH, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER BRIAN F. MACOM, individually and in his capacity as police officer of the Village of Tarrytown; BARRY WARHIT, individually and in his capacity as justice of the Village of Tarrytown; SHAMEKA TAYLOR, individually and in her capacity as an Assistant District Attorney in the County of Westchester, DISTRICT ATTORNEY'S OFFICE, County of Westchester; COUNTY OF WESTCHESTER, STATE OF NEW YORK
Defendants.

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# MEMORANDUM OF LAW IN SUPPORT OF COUNTY DEFENDANTS' MOTION TO DISMISS THE INSTANT ACTION PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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## PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Defendants Assistant District Attorney Shameka Taylor, sued in her individual and official capacity and the County of Westchester[1] (hereinafter referred to collectively as "County Defendants"), in support of the instant motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint in its entirety (a copy of the Complaint and its Exhibits numbered 1 through 11 are annexed to the Declaration of Shannon S. Brady as Exhibit A (hereinafter "Brady Declaration")).

## FACTS

The pertinent allegations, which for present purposes only, are necessarily deemed to be true, are as follows:

Plaintiff Daniel McGuire ("Plaintiff") lives at 104 Main Street, Tarrytown, New York and has lived there since December 2006. Brady Declaration, Exhibit A, Section II, ¶1. On or about June 8, 2007, Plaintiff had a dispute with neighboring renters over their dumping of garbage on public property adjacent to Plaintiff's property. The dispute became heated and the neighbors threatened and harassed Plaintiff, causing him to call the police department for assistance. Brady Declaration, Exhibit A, Section II, ¶2.

Defendants John Barbalet, Giampiccolo and Cole (all Tarrytown Police Officers) reported to Plaintiff's residence, but refused to accept his complaint about being assaulted, threatened or harassed. Plaintiff alleges that said Defendants told him that he had no grounds to demand anything of his neighbor and that the police defendants ignored his demand to lodge a criminal complaint. Brady Declaration, Exhibit A, Section II, ¶3.

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[1] Although the Complaint names the "District Attorney's Office, County of Westchester" as a Defendant, the "District Attorney's Office" (as opposed to the individual District Attorney) is a Department of the County of Westchester and does not have a legal identity separate and apart from the municipality and cannot sue or be sued. Hall v. City of White Plains, 185 F.Supp.2d 293 (S.D.N.Y. 2002). Moreover, to the extent that Plaintiff's allegations against the District Attorney's Office center solely on his prosecution, the District Attorney's Office is an arm of the State, not the County. *See* Point II(B), *infra*.

Plaintiff alleges that he was aware that his "offensive neighbor" was employed by two Tarrytown police sergeants ("brothers Barbelet") in their side business, Sleepy Hollow Landscaping. When Plaintiff questioned the three defendant police officers as to whether they were protecting the Barbalets' employee, Plaintiff claims that Defendant John Barbalet told him not to be a "wise ass" and Defendant Cole threatened to arrest Plaintiff for disorderly conduct. Plaintiff told the defendant police officers that he had called the police because he had been harassed and threatened by his neighbor, not because he wanted to report a garbage complaint. No summonses or complaints were lodged as an immediate result of this first call. Brady Declaration, Exhibit A, Section II, ¶4.

Later in the day on June 8, 2007, a further dispute caused the Loja neighbor to call the police for assistance. Defendants Budnar, Giampiccolo and Smith responded to the call. According to the police report issued as a result of this call (Exhibit 2 of the Complaint), Loja told the police officers that Plaintiff had threatened him with a handgun earlier in the day. Plaintiff was not questioned by the police officers when they responded to the Loja residence as a result of this second call. Brady Declaration, Exhibit A, Section II, ¶5.

On June 9, 2007, the day after these incidents, Plaintiff was called to the Tarrytown Police Headquarters under the "guise" of addressing his sanitation code complaints. When he arrived at headquarters, he was arrested and charged with menacing for allegedly threatening his neighbor with a pistol. Brady Declaration, Exhibit A, Section II, ¶ 6. Plaintiff alleges that he complained at that time to defendants Brown, J. Barbalet, Cole, Macom and Gardner that he was the victim of false arrest based upon the conflict of interest of the responding officer, who was the alleged employer of Loja. Brady Declaration, Exhibit A, Section II, ¶ 7.

Plaintiff was arraigned on June 9, 2007 by defendant Warhit and released on his own recognizance. A Temporary Order of Protection ("TOP") was issued in favor of Loja. The TOP is annexed to the Complaint as Exhibit 4. Brady Declaration, Exhibit A, Section II, ¶ 8. Plaintiff alleges that he complained to Defendant Warhit during his arraignment regarding the conflict of interest and the "malicious and false nature of his arrest and prosecution". He further alleges that Defendant Warhit advised Plaintiff to take his complaints to the District Attorney's office. Brady Declaration, Exhibit A, Section II, ¶ 12.[2]

Plaintiff claims that within 72 hours of his arrest on June 9, 2007, he contacted the intake unit of the Westchester County District Attorney's office. He complained that he was being "falsely charged by a police officer" and explained what he described as the "apparent conflict of interest" in pursuing charges against Plaintiff while ignoring Plaintiff's complaints. Plaintiff alleges that the intake unit refused to help or even speak with Plaintiff and referred Plaintiff to counsel assigned to the local justice court. Brady Declaration, Exhibit A, Section II, ¶ 13.

On or about June 26, 2007, Plaintiff wrote a letter to Defendant Mayor Fixell explaining the conflict of interest, as well as providing a detailed description of his

[2] However, Plaintiff's own letter, which he annexed as Exhibit 5, contradicts this allegation. The letter, written 17 days after his arraignment, indicates that Defendant Warhit told the Plaintiff that the Police were supposed to take his cross complaint.

version of the events that had transpired to that date. A copy of the letter is annexed to the Complaint as Exhibit 5. Brady Declaration, Exhibit A, Section II, ¶ 14.

By letter dated July 11, 2007, Defendant McCabe, the Village Administrator for the Village of Tarrytown, responded to Plaintiff's June 26, 2007 letter. McCabe's letter is annexed to the Complaint as Exhibit 6. Plaintiff quotes the following portion of said letter that addresses a village policy – it is "Village policy (common in police departments in this area) not to file cross complaints but rather to refer to complaint to the District Attorney's office…Both the Police Chief, and separately the Village Attorney have suggested that you should take your complaints to the District Attorney's Office". Brady Declaration, Exhibit A, Section II, ¶ 15.

Plaintiff further indicates that his trial counsel explained the alleged conflict of interest to the justice court and the prosecutor, Defendant Taylor, during the trial of the charges. The Complaint further alleges that Defendant Taylor "refused to acknowledge" that the complaining witness, Loja, was employed by Defendant Barbalet. Brady Declaration, Exhibit A, Section II, ¶ 17.

Plaintiff's main allegations against Defendant Taylor are contained in ¶ 19 of the Complaint. It is alleged that Defendant Taylor "intentionally and effectively avoided calling defendant Sergeant Barbalet as a witness in order to avoid cross examination" and that Taylor had an "affirmative duty to prevent or curtail the unjust prosecution of Maguire". Brady Declaration, Exhibit A, Section II, ¶ 19.

Despite these alleged actions and inactions of the Defendants in this matter, Plaintiff was ultimately acquitted of all charges after a trial in September 2007. Brady Declaration, Exhibit A, Section II, ¶ 9 and 19.

**Legal Standard on a Rule 12(b)(6) Motion**

The legal issue on a Rule 12(b)(6) motion for dismissal of a complaint for failure to state a claim is whether plaintiff can prove any set of facts in support of his claim that would entitle him to relief. Harris v. City of New York, 186 F.3d 243, 247 (2d Cir. 1999). "When determining the sufficiency of plaintiffs' claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in [plaintiff's]...complaint, which are accepted as true." Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993). However, "[a] complaint is deemed to include any written instrument attached to it as an exhibit [citations omitted], materials incorporated in it by reference [citations omitted], and documents that, although not incorporated by reference, are 'integral' to the complaint [citations omitted]." Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004). Therefore, in this case, the eleven (11) Exhibits annexed to and reference in the Complaint are deemed to be included in the Complaint and may be considered on this motion to dismiss.

**POINT I**

**DEFENDANT TAYLOR IS ENTITLED TO ABSOLUTE IMMUNITY**

**A. Defendant Taylor, in Her Official Capacity, is Entitled to Immunity Under the Eleventh Amendment of The United States Constitution**

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend. XI.

"A district attorney or assistant district attorney being sued in her official capacity is a quasi-judicial official representing the State, and as such may invoke Eleventh

Amendment immunity as a defense to suit under § 1983 [citation omitted]." Green v. New York City Police Dep't, 1997 U.S. Dist. LEXIS 4310 (S.D.N.Y. 1997), at *5; *See also* Bail v. Ramirez, 2007 U.S. Dist. LEXIS 25232, at *11 (S.D.N.Y. 2007), and Ying Jing Gan v. The City of New York, 996 F.2d 522, 535-536 (2nd Cir. 1993).

Consequently, Defendant Taylor is entitled to Eleventh Amendment immunity in her official capacity, as Plaintiff's claims rely solely on allegations of acts committed by Taylor during the course of the prosecution of Plaintiff. As there is no indication that Plaintiff is alleging any actions taken by Defendant Taylor outside the scope of the prosecution of this matter, the Complaint should be dismissed in its entirety against Defendant Taylor in her official capacity.

**B. Defendant Taylor is Entitled to Absolute Immunity in her Individual Capacity**

It is well settled that a prosecutor is entitled to absolute immunity from federal and state civil suit when acting within the scope of his/her duties in initiating and pursuing criminal prosecution. Shmueli v. City of New York, et al, 424 F.3d 231 (2d Cir. 2005) and Johnson v. Kings County District Attorney's Office, 308 A.D.2d 278, 763 N.Y.S.2d 635 ( 2nd Dept. 2003). Specifically, the Shmueli court held that "[i]t is by now well established that 'a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution,. . . is immune from a civil suit for damages under § 1983,'" *Id.* at 236-237, *citing* Imbler v. Pachtman, 424 U.S. 409, 410 and 430-431, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976).

Moreover, the Shmueli court also held that

> [o]nce the court determines that the challenged prosecution was not clearly beyond the prosecutor's jurisdiction, the prosecutor is shielded from liability for damages for commencing and pursuing the prosecution,

> regardless of any allegations that his actions were undertaken with an improper state of mind or improper motive. . .For example, a defense of absolute immunity from a claim for damages must be upheld against a §1983 claim that the prosecutor commenced and continued a prosecution that was within his jurisdiction but did so for purposes of retaliation, *see, e.g.*, Barr, 810 F.2d at 360-62, or for purely political reasons, *see, e.g.*, Bernard, 356 F.3d at 504 ("the fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity"). A prosecutor is also entitled to absolute immunity despite allegations of his "knowing use of perjured testimony" and the "deliberate withholding of exculpatory information." Imbler, 424 U.S. at 431 n. 34. Although such conduct would be "reprehensible," it does not make the prosecutor amenable to a civil suit for damages. *Id.*

Indeed, "[t]his immunity extends to activities associated with the decision to prosecute, including such acts as moving to suppress evidence and *choosing which witnesses to call* [emphasis supplied]." Bail, *supra*, at *14, *citing* Imbler, *supra*, at 431.

It is clear from a plain reading of the Complaint that all of the allegations against Defendant Taylor are in the context of her prosecution of the case against Plaintiff. Specifically, Plaintiff alleges that (1) he explained the alleged conflict of interest to Defendant Taylor during the trial of the charges; (2) Defendant Taylor "refused to acknowledge" that the complaining witness, Loja, was employed by Defendant Barbalet (Brady Declaration, Exhibit A, Section II, ¶ 17); (3) Defendant Taylor failed to call a particular witness and that (4) she had an affirmative duty to prevent or curtail the unjust prosecution of Plaintiff (Brady Declaration, Exhibit A, Section II, ¶ 19). As none of these allegations fall outside Defendant Taylor's prosecution of Plaintiff's case, absolute immunity attaches to all of Defendant Taylor's actions and the case warrants dismissal.

Moreover, to the extent that there is an allegation that some or all of the actions taken by Defendant Taylor were in furtherance of a conspiracy, said claims should be dismissed "since absolute immunity spares the official any scrutiny of his motives, an allegation that an act was done pursuant to a conspiracy has no greater effect than an allegation that it was done in bad faith or with malice, neither of which defeats a claim of absolute immunity." Tapp v. Champagne, 164 Fed. Appx. 106, at *4 (2d Cir. 2006), (*citing* Dorman v. Higgins, 821 F.2d 133, 139 (2d Cir. 1987)). *See also* Shmueli, *supra*, ("These principles are not affected by allegations that improperly motivated prosecutions were commenced or continued pursuant to a conspiracy.").

Finally, although

> absolute immunity is an affirmative defense whose availability depends on the nature of the function being performed by the defendant official who is alleged to have engaged in the challenged conduct [citations omitted]…the nature of that function is often clear from the face of the complaint. In that circumstance, the absolute immunity defense may be resolved as a matter of law on a motion to dismiss the complaint pursuant to Rule 12(b)(6) [citations omitted]" Shmueli, *supra*, at 236..

As already established, it is clear from the face of the complaint that all of the allegations against Defendant Taylor are specific to her role as the prosecutor in Plaintiff's criminal prosecution (Brady Declaration, Exhibit A, ¶ 19). There is no allegation that Defendant Taylor took any actions outside of her prosecutorial functions. Therefore, she is entitled to absolute immunity and it is appropriate to dismiss Plaintiff Complaint pursuant to the instant motion to dismiss. Shmueli, *supra*, at 236.

## POINT II

## THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE AGAINST THE COUNTY DEFENDANTS

### A. Plaintiff's Pendent State Law Claims Should Be Dismissed in Their Entirety, As He Failed to File a Notice of Claim against the County Defendants

In reviewing Plaintiff's First and Second Causes of Action, entitled "False Arrest/Selective Enforcement" and "Malicious Prosecution/Abuse of Process", it is clear that said claims are pled as pendent state law claims, as there is no reference to a federal statute.[3] However, Plaintiff has failed to affirmatively plead that he filed a notice of claim against the County Defendants, as required when bringing a tort claim against a municipality or against any of its officers, agents or employees. Perez v. County of Nassau, 294 F.Supp.2d 386, 391 (E.D.N.Y. 2003), *citing* Fincher v. County of Westchester, 979 F.Supp 989, 1002 (S.D.N.Y. 1997) ["The notice of claim requirements apply equally to state tort claims brought as pendent claims in a federal civil rights action"].

N.Y. Gen. Mun. Law § 50-e (1)(a) provides, in relevant part,

> In any case founded upon a tort, a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.

Moreover, New York County Law § 52 (1) states: "Any claim or notice of claim against a county for damage, injury or death, or *for invasion of personal or property rights*, of every name and nature, and whether casual or continuing trespass or nuisance and *any other claim for damages arising at law or in equity,* alleged to have been caused …must be made and served in compliance with section fifty-e of the general municipal law. (Emphasis added)." Not only did Plaintiff fail to plead that he filed a notice of claim against the County Defendants within 90 days after his claims arose, upon information and belief, no such notice of claim was filed.[4]

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[3] Indeed, as Plaintiff's Third Cause of Action is entitled "42 U.S.C. §1983", it is clear that the First and Second Causes of Action intend to raise only state law claims.

[4] In fact, Plaintiff specifically alleges that he filed a Notice of Claim upon the Village of Tarrytown (Brady Declaration, Exhibit A, Complaint, Section III., ¶ 39) and annexes a copy of the Notice to the Complaint as Exhibit 11. However, no where in the Complaint does Plaintiff allege that he filed one against the County Defendants.

"The failure to comply with provisions requiring notice and presentment of claims prior to commencement of litigation ordinarily requires dismissal" Perez, *supra*. As Plaintiff has completely failed to comply with the provisions requiring notice and presentment of claims as to the County Defendants, all of Plaintiff's pendent state law claims against the County Defendants should be dismissed with prejudice.

**B. Plaintiff Fails to State a Cause of Action Against the County of Westchester**

To the extent that Plaintiff is alleging claims against the County of Westchester pursuant to 42 U.S.C. §1983 in the Third Cause of Action, it is respectfully submitted that in order "to state a civil rights claim under §1983, a complaint must contain specific allegations of fact which indicate a deprivation of constitutional rights; allegations which are nothing more than broad, simple and conclusory statements are insufficient to state a claim under §1983 [citations omitted]" Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887. The instant Complaint contains nothing more than broad, simple and conclusory statements with respect to the County Defendants. It is clear that the majority of the allegations contained in the Complaint are directed toward the Village Defendants and that those claims that include the County Defendants are merely ancillary and conclusory. As the references to the County Defendants are too simple and conclusory to state a valid §1983 claim against the County Defendants, the Complaint should be dismissed with prejudice as against the County Defendant in its entirety. Alfaro, *supra*.

Moreover, it is well settled that a

> municipality "may not be sued under §1983 for an injury inflicted solely by its employees or agents." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Instead, it may be held liable only "when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

official policy, inflicts the injury[.]" Id. Younger v. City of New York, 480 F. Supp. 2d 723, 733.

As an initial matter, it is well established in New York that the District Attorney, and the District Attorney alone, should decide when and in what manner to prosecute a suspected offender. *See* Beaz v. Hennessy, 853 F.2d 73, 77 (2d Cir. 1988), *cert denied*, 488 U.S. 1014, 109 S.Ct. 805 (1989). When prosecuting an individual, a District Attorney acts on behalf of New York State not the county. Id. Also, the County has no right to establish a policy concerning how a District Attorney should prosecute violations of State penal laws. Id. In fact, it would be an ethical violation of a District Attorney as counsel for the State to be influenced by so-called policies of a county. Thus, the actions of the District Attorney cannot be said to be those of the County, and the County is not liable for any acts of the District Attorney's Office in the decision of whether to initiate a criminal prosecution, and the conduct of that prosecution. *See also* McLaurin v. New Rochelle Police Officers, et al., 368 F.Supp.2d. 289, 294-295 (S.D.N.Y. 2005). Therefore, all the claims against the County of Westchester with respect to the prosecution of Plaintiff should be dismissed in their entirety.

Even if one could argue that the actions of the prosecutor somehow implicated the policies of the County of Westchester, which they do not, Plaintiff has completely failed to allege any facts to establish that a violation of his constitutional rights occurred from a County custom or policy. In the Third Cause of Action, Plaintiff alleges that "it is and was the custom and policy of the Village, its officers and departments, *as well as that of Westchester County and its District Attorney's Office*, to allow and/or prevent the lodging of complaints in an arbitrary and capricious manner. See McCabe letter, Exhibit 6 [emphasis supplied]" (Brady Declaration, Exhibit A, Section II, ¶22). It is significant that Plaintiff points to a letter from the Village Administrator of Tarrytown for an alleged statement of *County* policy. However, it is respectfully submitted that the alleged policy stated by Plaintiff can only be attributed to the Village of Tarrytown, not to the County of Westchester as the letter from the Village Administrator specifically identifies this as a *Village* policy, not a County policy.

Moreover, a review of the letter that Plaintiff wrote on or about June 26, 2007 (Brady Declaration, Exhibit A, Exhibit 5) neither references a County policy, nor does it detail any contact with the District Attorney's Office.[5] Plaintiff writes to Defendant Mayor Fixell that he told the police that he wanted to file a cross complaint against his neighbors and the police told him that "the judge would file that charge". Plaintiff further states in this letter that when he asked the judge to file a cross complaint, the judge told Plaintiff that the "Police were supposed to take it". Therefore, neither the Complaint, nor its exhibits, support the allegation that the County Defendants had a policy which "allow[s] and/or prevent[s] the lodging of complaints in an arbitrary and capricious manner." Brady Declaration, Exhibit A, Section II, ¶ 22 Indeed, it is clear that the policy referenced in the Complaint was a Village policy, not a County policy. As such, the Third Claim for relief against the County Defendants should be dismissed with prejudice against the County Defendants.

There is no allegation of a County policy contained anywhere in the Complaint, merely an inference that the County policy is the same as the Village policy (Brady Declaration, Exhibit A, Section II, ¶ 22). "Beyond the broad allegations of his pleadings, [Plaintiff] presents no evidentiary support for the existence of such a municipal policy, custom or practice, nor any indication of how any such [County] conduct resulted in the harms [Plaintiff] suffered…The existence of a municipal policy or practice entailing deprivations of constitutional rights cannot be grounded solely on the conclusory assertions of the plaintiff" Younger, *supra*. Therefore, as Plaintiff has not plead an official policy or custom of the County of Westchester that caused him to be subjected to a denial of a constitutional right, all of Plaintiff's claims against the County of Westchester should be dismissed with prejudice in its entirety. Id.

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[5] As discussed *supra*, the exhibits referenced in and annexed to the Complaint can be considered on this motion to dismiss. *See* Sira, *supra*.

Moreover, even if the complaint identified a County policy, the claims against the County would fail because "'[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.' [citation omitted]". Murray v. Admin. for Children's Servs., 476 F. Supp. 2d 436, 442 (S.D.N.Y. 2007). Not only does the Complaint fail to allege unconstitutional activity that can be attributed to the County Defendants, it also fails to allege that Plaintiff's prosecution was caused by an existing, unconstitutional policy of the County of Westchester. Therefore, the Complaint against the County of Westchester should be dismissed in its entirety.

### C. Plaintiff's claims under the First Amendment, Second Amendment, Fourth Amendment and Fourteenth Amendment

Paragraph 24 of the Complaint references specific §1983 claims pursuant the First Amendment (¶24(A)), Second Amendment (¶24(B)), Fourth Amendment (¶24(C)) and Fourteenth Amendment (24(D)). However, many of the claims contained in this paragraph reference alleged constitutional violations that did not involve the County and/or occurred prior to County Defendants' involvement in Plaintiff's case. *See* ¶24(B) and (C). Those acts which did not involve the County Defendants, or which took place prior to County Defendants' involvement in the case, cannot serve as a basis for liability against the County Defendants and should be dismissed in its entirety against the County Defendant.

To the extent that said claims allege constitutional violations by County Defendants, it is respectfully submitted that said claims should be dismissed. All of the conduct Plaintiff alleges in connection with these alleged constitutional violations occurred during the actual prosecution should be dismissed as to Defendant Taylor pursuant to her Eleventh Amendment and absolute prosecutorial immunity (*See* Point I, *supra*). Moreover, these claims are brought against the County of Westchester under §1983 and it has been established that Plaintiff failed to plead an official policy or custom of the County of Westchester that caused him to be subjected to a denial of a constitutional right. As such, the alleged constitutional violations contained in paragraph 24 as alleged against the County of Westchester should be dismissed with prejudice in its entirety.

## POINT III

## PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST COUNTY DEFENDANTS UNDER 42 U.S.C. §§1985 OR 1986

In order to state a claim under 42 U.S.C. §1985, a Plaintiff is required to allege, "(1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States" Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999). In sum, a "complaint containing 'conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss' Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997) (citations omitted)" Perlleshi v. County of Westchester, 2000 U.S. Dist. LEXIS 6054, at *22. In addition, a claim under 42 U.S.C. §1986, fails if the claim under §1985 cannot be sustained. Rivera v. Goord, 119 F. Supp. 2d 327, 345 (S.D.N.Y. 2000).

In the first instance, it appears that Plaintiff alleges his §1985 claim only against the Village Defendants. *See* Plaintiff's Fourth Cause of Action ¶ 26-28, wherein Plaintiff refers only to the "police defendants". Therefore, Plaintiff does not allege any facts to maintain the claimed violation of 42 U.S.C. §1985 by the County Defendants. Not only does Plaintiff fail to allege specific acts that constitute a conspiracy with respect to the County Defendants, he specifically indicates that it was the village police defendants that conspired against him. Moreover, as a §1985 claim cannot be sustained against County Defendants, Plaintiff's Fifth Cause of Action pursuant to §1986 must be dismissed as well. *See*, Rivera, *supra*. Consequently, Plaintiff Fourth and Fifth Causes of Action under §1985 and §1986 must be dismissed for failure to state a claim against the County Defendants.

## CONCLUSION

It is respectfully submitted that this Honorable Court grant the instant motion to dismiss Plaintiff's Complaint in its entirety inasmuch as Plaintiff fails to state any claims upon which relief may be granted, together with costs, fees, disbursements, and such other and further relief as this Honorable Court deems just and proper.

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Respectfully submitted,

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